

Service Date: January 22, 1999

**DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA**

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IN THE MATTER of the Application of)	UTILITY DIVISION
Preferred Carrier Services, Inc. and)	
U S WEST Communications, Inc.)	DOCKET NO. D98.11.273
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	ORDER NO. 6139
Approval of their Resale Agreement)	

FINAL ORDER APPROVING RESALE AGREEMENT

Introduction and Procedural Background

1. The Telecommunications Act of 1996 (1996 Act)¹ sets out methods by which local competition may be encouraged in local exchange markets which historically have been monopolistic. One of the paths to a competitive local exchange market set forth in the 1996 Act is resale of services. *See* 47 U.S.C. . . 251(b)(1) and (c)(4). Parties can voluntarily negotiate agreements for resale or they may request state commissions to mediate or arbitrate unresolved issues. 47 U.S.C. . 252. Once agreement is reached voluntarily or by arbitrating, the parties to the agreement must submit it to the appropriate state commission for approval. 47 U.S.C. . 252(e).

2. U S WEST Communications, Inc. (U S WEST) entered into an interconnection agreements with Preferred Carrier Services, Inc. (Preferred Carrier) for resale of U S WEST services according to the 1996 Act. U S WEST filed the agreement, entitled "Agreement for Service Resale Between Preferred Carrier Services, Inc. and U S WEST Communications, Inc."

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

(Agreement) with the Montana Public Service Commission (Commission) on November 17, 1998. The Agreement was docketed as D98.11.273. It provides for Preferred Carrier to resell U S WEST's local exchange services in Montana.

3. The Commission issued a Notice of Application for Approval of Service Resale and Opportunity to Intervene and Comment on November 23, 1998, giving public notice of the requirements that the Commission approval of the application be nondiscriminatory toward other telecommunications carriers not parties to the agreements and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by December 8, 1998. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than December 18, 1998.

4. The Commission's published notice advised interested parties in the geographic areas affected by the Agreement that intervention was limited and that the Montana consumer Counsel (MCC) could be contacted to represent consumer interests. No hearing has been requested and no comments or requests for intervention received in regard to the Agreement. The Agreement is substantially the same as previously approved resale agreements between U S WEST and other resellers.

Applicable Law and Commission Decision

A. Standard for Approval

5. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

6. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by February 15, 1999--90 days following the submission of the Agreement for Commission approval.

7. The Commission must approve or reject the Agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

8. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act, which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

9. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in § 251(b) and (c). Sections 251(b), 252(c)

and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in . 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

10. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that . . 252(a) and (c) prevent the Commission from addressing such issues in these proceedings.

11. No comments have been received that express any reservations about the parties' Agreement not complying with federal law as cited above or with state telecommunications requirements. The MCC, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and necessity.

12. With the exception of particular sections of the Agreement as specifically discussed below, the Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the Act. The Commission finds that the Agreement should be approved, except as specifically rejected and explained below. In approving this Agreement, the Commission is guided by provisions in state and federal law which have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

B. Terms rejected.

13. Payment - Section VII.C (pp. 9-10) sets forth in detail the provisions for payment to U S WEST by Preferred Carrier. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. According to . VII.C.5, the resellers' payments to U S WEST, if not made pursuant to the terms of this section, could place the resellers' end user customers' services in jeopardy of being disconnected through no fault on their part.

14. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must Preferred Carrier. If notified of a pending termination of service to Preferred Carrier's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to Preferred Carrier's end users with no notification to the Commission. The Commission rejects . VII.C.5 of the Agreement. The parties may amend this section of their Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time in which to take any appropriate action to protect end users.

15. Dispute Resolution - Section VII.Q sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest,

convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of their Agreement to address this concern.

C. Other concerns

16. The Commission has repeatedly rejected sections such as these in numerous agreements. Initially, the Commission included the following language in several orders:

U S WEST's persistence in using these terms despite their continued rejection creates additional work for the Commission, its staff, and the parties to the agreements. Once a contract provision is rejected and the reasons for the rejection are explained, the provision should not be included in future agreements. This will lessen the need for further amendments to the agreements and will expedite resellers market entry.

In the Matter of the Application of Firstel, Inc. and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Resale Agreement,
Docket No. D98.1.15, Order No. 6059, at ¶ 15 (Mar. 16 1998).

17. In addition to this paragraph, the Commission included the following directive in Order No. 6059: "It is further ORDERED that future agreements submitted to this Commission for approval pursuant to 47 U.S.C. . 252 shall not include the verbatim language of the portions of these agreements rejected in this and previous orders." When U S WEST did not respond to these Commission instructions, Chairman Dave Fisher sent a letter to Rick Hays, Vice-President for U S WEST in Montana, requesting his assistance in stopping this conduct. Mr. Hays responded that all future agreements would be consistent with Commission orders. For a time, U S WEST corrected the problem, but has again reverted to its practice of including these inappropriate sections in the agreements that it negotiates with competitive local exchange

carriers.² As we stated in Order No. 6137 and 6138, U S WEST's continued unresponsiveness to Commission orders is unacceptable.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. Preferred Carrier intends to resell telecommunications services in U S WEST territories throughout Montana. Section 69-3-804, MCA (1995), has previously provided an exemption from Commission regulation for resellers. Senate Bill 89, passed by the 1997 Montana Legislature and signed into law by the Governor of Montana on April 22, 1997, removes the exemption from regulation in Montana for resellers of regulated telecommunications services. As a reseller of regulated telecommunications services in Montana, Preferred Carrier will be subject to Commission authority to supervise, regulate and control public utilities.

3. Before providing services in Montana, Preferred Carrier initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so. Section 69-3-805, MCA. In addition, § 69-3-805(1)(e) requires Preferred Carrier to file initial price lists or tariffs for

² See In the Matter of the Application of Regal Telephone Company, Inc., a division of Regal Diversified, and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Interconnection Agreement, Docket No. D98.12.278, Order No. 6138 (Jan. 15, 1999); and In the Matter of the Application of NET-tel Corporation and U S WEST Communications, Inc. Pursuant to Section 252(e) of the Telecommunications Act of 1996 for Approval of their Interconnection Agreement, Docket No. D98.11.264, Order No. 6137 (Jan. 15, 1999).

regulated telecommunications services or to request that filing of such tariffs or price lists be waived by the Commission.

4. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it.

Section 69-3-103, MCA.

5. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934*, 47 U.S.C. . . . 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

6. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

7. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to . 252(e)(2)(A). Section 69-3-103, MCA.

8. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. . 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such

agreements. Section 252(e)(4) requires the Commission to approve or reject the Regal Agreement by March 2, 1999, or the Agreement will be deemed approved.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the resale agreement of the parties in Docket No. D98.11.273, submitted to this Commission for approval pursuant to the 1996 Act, is approved as discussed herein, subject to the following conditions:

1. The parties may file amendments to the Agreement without delay consistent with the Commission's decision in this Docket.
2. The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.
3. U S WEST shall not file any future resale agreements which include the contract provisions rejected herein or similar provisions which do not comply with this and prior orders of the Commission with respect to its agreements with competitive carriers.

DONE AND DATED this 20th day of January, 1999, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.